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ESCV Resources Holdings Sdn Bhd v Liqua Health Marketing (M) Sdn Bhd & Anor

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HIGH COURT (KUALA LUMPUR) — NO D5–22–702 OF 2003
AMELIA TEE ABDULLAH JC
13 NOVEMBER 2009

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Contract — Breach — Damages — General and aggravated damages — Whether actual loss established — Whether evidence adduced to show sufficient work done during short tenure of agreement — Whether amount claimed reasonable — Loss of reputation — Whether financial position of plaintiff relevant — Whether plaintiff succeeded in proving loss of reputation

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Contract — Breach — 'Mandate and Facilitators'/Passport Fee Agreement' — Securing backdoor listing of first defendant — Obligations under agreement — Failure to comply — Whether failure established — Whether privity of contract between plaintiff and first defendant established — Whether agreement void due to impossibility of performance

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The plaintiff was a company carrying on business as an investment company and a commission agent. The first defendant was, at the material time, a direct sales company dealing with health products. The second defendant, Goh Bak Ming @ BM Goh, was a majority shareholder of the first defendant. The plaintiff's claim against the defendants was for specific performance of an agreement entered into between the parties on 30 August 2002 known as the 'Mandate and Facilitators'/Passport Fee Agreement'. Alternatively, the plaintiff claimed for damages of RM30m (RM2m and RM28m) and interest, aggravated damages of RM10m, interest, and costs. In the above case, the subject matter of the agreement was to achieve two goals, namely, the stay of the winding up of ST Holdings Bhd ('STB') and secondly the relisting of STB with the injection of the first defendant's assets. It was Richard Koh ('SP2') from the plaintiff and SP3, the former general manager of Samanda Holdings where SP2 was previously employed, who had approached the second defendant with their offer to assist in securing a backdoor listing for the first defendant. The first defendant however, denied that it was a party to the agreement. The second defendant had also pleaded the plaintiff's lack of locus standi to commence the suit. It was contended that the plaintiff was merely an agent for the principal owners. Further, the second defendant contended that the plaintiff had failed to fulfill its obligations under the

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agreement and accordingly, had terminated the agreement vide its letter dated 2 October 2002 and that no actual damage was suffered by the plaintiff.

Held, dismissing the plaintiff's claim with costs:

(1) On the face of the agreement, the very citation of the parties makes it clear that the first defendant was never intended to be a party to the agreement. If it was the intention of the parties that the first defendant was to be a party, it would have been the simplest thing to have the second defendant signed for and on behalf of the first defendant just as SP1 had signed for and on behalf of the plaintiff. The use of different words in the same document to describe the parties on whose behalf the second defendant and SP1 were signing would denote that the use of the different terminology was intentional. From that, it was the intention of the parties that the second defendant was not entering into the agreement on behalf of the first defendant. Therefore, there was no privity of contract between the plaintiff and the first defendant and as such, the agreement signed between the plaintiff and the second defendant could not bind the first defendant (see paras 12 & 17).

(2) The RM30m was only to be payable upon the Securities Commission approving the corporate exercise. It was obvious that the plaintiff's proposal did not proceed very far or for very long. There was no evidence that the Securities Commission had approved the corporate exercise, or were about to approve the corporate exercise. There was no evidence adduced that sufficient work had been done during the 32 days tenure of the agreement to even show that the approval was a possibility (see paras 51 & 54).

(3) With regards to the plaintiff's claim of RM10m for the loss of its reputation as an investment company and commission agent, the court noted that SP2 was the only employee of the plaintiff and that its two directors both hold down full time jobs. The statutory documents extracted from the Companies Commission of Malaysia revealed that it was incorporated on 18 December 1998. However there appeared to be no information as to its financial position. In light of this, and in the absence of any evidence whatsoever on this claim of loss of reputation, the plaintiff had not succeeded in proving that it had in fact suffered any loss of reputation (see para 52).

[Bahasa Malaysia summary

Plaintif adalah sebuah syarikat yang menjalankan perniagaan sebagai sebuah syarikat pelaburan dan ejen komisen. Defendan pertama adalah, pada masa material, satu syarikat jualan langsung berurusan dengan produk kesihatan.

Defendan kedua, Goh Bak Ming @ BM Goh, adalah pemegang saham majoriti defendan pertama. Tuntutan plaintif terhadap defendan-defendan adalah bagi pelaksanaan spesifik satu perjanjian ditandatangani antara pihak-pihak pada 30 Ogos 2002 yang dikenali sebagai 'Mandate and Facilitators'/Passport Fee Agreement'. Secara alternatif, plaintif menuntut untuk kerugian-kerugian sebanyak RM30 juta (RM2 juta dan RM28 juta) dan faedah, ganti rugi tambahan sebanyak RM10 juta, faedah, dan kos-kos. Dalam kes ini, isi perjanjian itu adalah untuk mencapai dua matlamat, iaitu, menangguh penggulungan ST Holdings Bhd ('STB') dan keduanya menyenaraikan semula STB dengan kemasukan aset-aset defendan pertama. Richard Koh ('SP2') daripada plaintif dan SP3, bekas pengurus besar Samanda Holdings di mana SP2 bekerja sebelum ini, yang telah berjumpa defendan kedua dengan tawaran mereka bagi membantu dalam mendapatkan penyenaraian secara pintu belakang untuk defendan pertama. Defendan pertama bagaimanapun, menafikan bahawa ia adalah sebuah pihak kepada perjanjian tersebut. Defendan kedua juga telah memplidkan kekurangan lokus standi plaintif untuk memulakan tindakan ini. Ia telah dinyatakan bahawa plaintif adalah cuma seorang ejen untuk pemilik-pemilik prinsipal. Selanjutnya, defendan kedua menyatakan yang plaintif telah gagal untuk memenuhi kewajipan-kewajipannya di bawah perjanjian tersebut dan oleh kerana itu, telah menamatkan perjanjian tersebut melalui suratnya bertarikh 2 Oktober 2002 dan yang tiada kerugian sebenar telah dialami oleh plaintif.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Perjanjian tersebut, secara kasarnya, cara nama pihak-pihak dinyatakan jelas menunjukkan bahawa defendan pertama tidak pernah diniatkan menjadi pihak dalam perjanjian tersebut. Jika menjadi niat pihak-pihak bahawa defendan pertama menjadi salah satu pihak kepada perjanjian tersebut, adalah lebih mudah untuk defendan kedua menandatangani untuk dan bagi pihak defendan pertama sama seperti SP1 telah menandatangani untuk dan bagi pihak plaintif. Penggunaan ayat-ayat yang berbeza dalam dokumen yang sama untuk menggambarkan pihak-pihak yang diwakili oleh defendan kedua dan SP1 menunjukkan bahawa penggunaan istilah yang berbeza itu disengajakan. Oleh itu, adalah niat pihak-pihak bahawa defendan kedua menandatangani perjanjian itu bukan bagi pihak defendan pertama. Oleh itu, tidak ada priviti kontrak antara plaintif dan defendan pertama dan oleh yang demikian, perjanjian yang ditandatangani plaintif dan defendan kedua tidak boleh mengikat defendan pertama (lihat perenggan 12 & 17).

(2) RM30 juta tersebut akan dibayar apabila Suruhanjaya Sekuriti membenarkan proses korporat tersebut. Adalah jelas bahawa cadangan plaintif tidak terlaksana dengan jayanya. Tidak ada bukti bahawa

Suruhanjaya Sekuriti telah meluluskan proses korporat tersebut, atau hampir meluluskan proses tersebut. Tidak ada bukti yang dikemukakan bahawa kerja-kerja yang mencukupi telah dilakukan dalam masa 32 hari tempoh perjanjian tersebut untuk menunjukkan bahawa kelulusan itu berkemungkinan (lihat perenggan 51 & 54).

(3) Berhubung dengan tuntutan plaintif sebanyak RM10 juta untuk kehilangan reputasinya sebagai sebuah syarikat pelaburan dan ejen komisen, mahkamah mendapati bahawa SP2 merupakan satu-satunya pekerja plaintif dan kedua-dua pengarahnya mempunyai kerja sepenuh masa. Dokumen-dokumen berkanun yang diperolehi daripada Suruhanjaya Syarikat Malaysia mendedahkan bahawa ia telah ditubuhkan pada 18 Disember 1998. Bagaimanapun tidak ada sebarang maklumat mengenai kedudukan kewangannya. Berdasarkan ini, dan dalam ketiadaan sebarang bukti terhadap tuntutan kehilangan reputasi ini, plaintif tidak berjaya dalam membuktikan bahawa ia sebenarnya telah mengalami sebarang kehilangan reputasi (lihat perenggan 52).]

Notes

For cases on breach in general, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2516–2749.

For cases on damages, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2586–2612.

Cases referred to

Exquisite Merge (M) Sdn Bhd v Life Publishers Bhd [1997] 2 MLJ 749; [1997] 3 CLJ 493, CA (refd)

Hadley v Baxendale (1854) 9 Exch 341 (refd)

Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd [1993] 2 MLJ 416, SC (folld)

Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors [1981] 2 MLJ 114, FC (refd)

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC (refd)

Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131; [2006] 2 CLJ 337, CA (refd)

Ting Yuk Kiong v Mawar Biru Sdn Bhd (Harry Lee Yew Tong, Applicant) [1995] 2 MLJ 700, HC (refd)

Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors [1995] 2 MLJ 709, FC (refd)

Legislation referred to

Contracts Act 1950 ss 57(1), 75, 183, 183(a), (b), (c)

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D Paramalingam (Krish Maniam & Co) for the plaintiff.
HR Dipendra (Gideon Tan and YC Chin with him) (Tengku Hishammuddin Ram Dipendra) for the defendants.

B **Amelia Tee Abdullah JC:**

[1] The plaintiff, ESCV Resources Holdings Sdn Bhd, is a company carrying on business as an investment company and a commission agent. The
C first defendant, Liqua Health Marketing (M) Sdn Bhd, was, at the material time, a direct sales company dealing with health products. The second defendant, Goh Bak Ming @ BM Goh, is a majority shareholder of the first defendant.

D **[2]** The plaintiff's claim against the defendants is for specific performance of the agreement entered into between the parties on 30 August 2002 ('the agreement'), and in the alternative, damages of RM30m (RM2m and RM28m) and interest, aggravated damages of RM10m, interest and costs. The first defendant denies that it is a party to the agreement. In the
E alternative, it contends that it is not bound by the agreement as its terms and conditions were impossible to perform. This alternative contention is also adopted by the second defendant. In addition, the second defendant has also pleaded lack of locus standi to commence the suit, the plaintiff's failure to fulfill its obligations under the agreement and that no actual damage was
F suffered by the plaintiff.

[3] The plaintiff called three witnesses in support of its case whilst the third defendant testified on his own behalf. The first defendant called no witnesses although it was represented by counsel during the hearing.

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[4] In light of the nature of the plaintiff's claim, it is pertinent at the offset to establish just who the plaintiff is. According to the corporate information extracted from the Companies Commission of Malaysia, the plaintiff was incorporated on 18 December 1998. The nature of its business is described
H as 'providing corporate management and advisory services'. Its authorised share capital is 100,000 although only 68,000 shares were issued. The shareholders of the plaintiff were Chu Pek Kim, holding 38,000 shares and Koh Luwan Kin (SP1) holding 30,000 shares. Chu Pek Kim and Koh Luwan were also the first directors of the plaintiff. It is noted that SP1 readily admits
I that he and Chu Pek Kim were holding the shares for the benefit of Koh Soo Hiong (SP2) as his nominee.

[5] From the evidence adduced from *Koh Luwan Kin* (SP1), the entire management of the plaintiff was left to Koh Soo Hiong (SP2) who was

described as an 'associate director'. SP1 is the younger brother of SP2 whilst Chu Pek Kim, the other shareholder and director, is SP2's wife. Both directors and shareholders were holding down other jobs, SP1 as the personal assistant to the general manager of 7–Eleven Sdn Bhd and SP2 as a manager with Citibank. Apart from Koh Soo Hiong (SP2), the plaintiff has no other employee.

[6] The cornerstone of this case would appear to be the document known as the 'mandate and facilitators'/passport fee agreement' ('the agreement') made on 30 August 2002. The defendants allude to it as a pre-agreement. How did this the agreement or pre-agreement come to be signed between the parties?

[7] At para 5 of the statement of claim, the plaintiff had pleaded as follows:

> 5 Defendan Pertama telah menawar Plaintiff untuk membantu Defendan Pertama dalam peneraian semula STB dalam KLSE dan Plaintiff telah bersetuju untuk menerima tawaran tersebut;

The above would not appear to be quite accurate. During cross-examination, SP2 testified that he was introduced to the second defendant through Mr Yeah Sheng Leong (SP3), a former general manager of Samanda Holdings where SP2 was previously employed. The court recorded the following evidence from SP2:

> Yes, it was through this relationship that *the both of us proposed* our services to Mr Goh and the promoters.

[8] The above evidence elicited during cross-examination of SP2 is consistent with the evidence of the second defendant in this regard. In answer 3 of his witness statement, he testified that it was Mr Yeah Sheng Leong who had introduced Mr Richard Koh as someone who may assist the plaintiff in seeking a backdoor listing. It was Richard Koh (SP2) from the plaintiff who had proposed the relisting of STB by injecting the assets and business of the first defendant. He further emphasised that the proposal to use STB was made by Richard Koh and it was he who offered his services to the first defendant to explore the possibility of relisting STB.

[9] In light of the above evidence, I find that it was SP2 who, together with SP3, approached the second defendant with their offer to assist in securing a back door listing for the first defendant. I find that the proposal to use STB as the vehicle for the listing did not emanate from the second defendant but came from SP2.

[10] At this juncture, it would be necessary to take a close and careful look at the mandate and facilitators/passport fee agreement. It is not in dispute that the agreement was prepared and provided by SP2. It is clearly stated in the agreement that the parties are 'GOH BAK MING @ BM GOH as a majority owner and for and on behalf of all shareholders/promoters ('promoters') of the proposed injection company namely LIGUA HEALTH MARKETING (M) SDN BHD (Co No 371858-W) ... of the one part and ESCV Resources Holdings Sdn Bhd ... of the other part'. The agreement is signed by Koh Luwan Kin (SP1) for and on behalf of the plaintiff and Goh Bak Ming, the second defendant, 'as majority owner, and for and on behalf of all the promoters of LIGUA HEALTH MARKETING (M) SDN BHD'. The identity of the plaintiff as one of the parties to the agreement is clear. However the identity of the other party is less obvious. Who does Goh Bak Ming represent when he entered into the agreement with the plaintiff?

[11] Learned counsel for the plaintiff has submitted that the second defendant was not only the owner of the first defendant but also its then managing director and that by signing the agreement and committing to the various warranties given therein, he had also committed the first defendant to those parts of the agreement and the proposed exercise which involved the first defendant. He further submitted that by signing the agreement, the second defendant could only have acted for the first defendant in his capacity as managing director of the first defendant.

[12] I am regretfully unable to agree with the plaintiff in this regard. On the face of the agreement itself, I find that the very citation of the parties makes it clear that the first defendant was never intended to be a party to the agreement. If it was the intention of the parties that the first defendant was to be a party, it would have been the simplest thing to have the second defendant sign for and on behalf of the first defendant just as SP1 had signed for and on behalf of the plaintiff. The use of different words in the same document to describe the parties on whose behalf the second defendant and SP1 were signing would denote that the use of the different terminology was intentional. From that I would conclude that it was the intention of the parties that the second defendant was *not* entering into the agreement on behalf of the first defendant.

[13] Reference is made to the case of *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131; [2006] 2 CLJ 337 where the Court of Appeal held as follows:

> It is axiomatic that it is the duty of the court to give effect to the clear intention of the parties as expressed in cl 5(b) of the agreement which is in clear, unambiguous and unmistakable language. In the *Central Bank of India Ltd, Amritsar v Harford Fire Insurance Co Ltd* AIR 1965 SC 1288 it was held that:

> Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[14] I thus find that the identity of the parties is clear. The second defendant signed the agreement as a majority owner and for and on behalf of all the shareholders/promoters of the proposed injection company. The court recalls the second defendant's evidence that at the material time, he owned about 30% of the shares of the first defendant. The court is not informed who were the other shareholders or promoters.

[15] The articles of association of the first plaintiff also afford considerable assistance to the court in determining whether the actions of the 'shareholders/promoters' can bind the first plaintiff. Reference is made to article 77 which states succinctly that 'the business of the company shall be managed by the directors ...'. Further article 100, which provides for the seal of the company and its use, states that the seal 'shall only be used by the authority of the directors or of a committee of the directors authorised by the directors in that behalf, and every instrument to which the seal is affixed shall be signed by a director and shall be countersigned by the secretary or by a second director or by some other person appointed by the directors for the purpose'. The court's attention was also drawn to cl 10 of the agreement which states that the agreement 'is *personal to the named promoters* as stated and shall not be assigned or otherwise transferred in whole or in part thereof to any other parties whatsoever without the written consent of ESCV'.

[16] The court agrees that the shareholders of a company are different from its directors and that the actions of the shareholders, without more, cannot bind a company. The second defendant did not sign as managing director or even as a director of the first defendant. I do not find the words 'as a majority owner and for and on behalf of all the shareholders/promoters ... of the proposed injection company' to mean that the second defendant was signing the agreement on behalf of the first defendant. Further the common seal of the first defendant was not affixed. The fact that the document was prepared by SP2 wherein he could have clearly stipulated that the second defendant was signing for and on behalf of the first defendant, if that was the real intention of the parties, only reinforces my conclusion in this regard.

[17] In light of the foregoing, I find that there is basis in the first defendant's contention that there is no privity of contract between the plaintiff and the first defendant and as such, the agreement signed between

the plaintiff and the second defendant cannot bind the first defendant. Having found so, it is unnecessary for the court to deal with the alternatives issues of whether the agreement was capable of performance and whether actual damages has been established by the plaintiff in respect of the first defendant.

WHETHER THE PLAINTIFF HAS LOCUS STANDI

[18] As far as the second defendant is concerned, it is not in dispute that he had signed the agreement. The main thrust of his defense is that the plaintiff has no locus standi to commence this action as it is only an agent. Reference is made to cl 4 of the agreement which reads as follows:

> LHM and the Promoters acknowledge that ESCV is *merely an Agent of the Principal Owners*, and is entering into this pre-Agreement in registering and protecting the vested interests of, and for and on behalf of the Principal Owners and/or their designated interested Associates. As such, all similar and applicable terms and conditions where applicable in this Agreement among others shall accordingly be incorporated in due course in the Principal Agreement to be signed and executed by the Promoters and the Principal Owners. (Emphasis added.)

[19] From the above it is clear that even at the point in time of signing the agreement the parties had envisaged that in due course an agreement would have to be signed and executed with the principal owners. The agreement was only executed to register and protect the vested interests of the principal owners and their designated interested associates. The role of the plaintiff can be seen in cl 3 where it is stated that 'LHM and the promoters acknowledge and recognise ESCV as *the primary facilitators/introducer* merely *for the purpose of making the introduction* and *providing the preliminary details* and to *assist in the proposed corporate exercise*'. The clause goes on to say that LHM and the promoters 'shall appoint their own independent professional advisors at their own costs for purpose of evaluating the suitability of STB'. From a reading of the above clause, it would appear that the role of the plaintiff, with its limited scope, was only insofar as to introduce the parties, provide preliminary details and to assist in the corporate exercise. This is consistent with the evidence of the second defendant as appears in answer 4 of his witness statement where he states as follows:

> The principle purpose of this agreement was to facilitate or mandate ESCV to introduce the principal owners of STB so that negotiation can take place towards the possibility of listing LQ. As such, the purpose of the agreement was to protect the interest of ESCV to earn their introducer's fee in assisting the possibility of listing LQ using STB as a vehicle.

[20] From this, it would appear that the role of the plaintiff is limited in scope. It was the agent for the principal owners. The agreement was executed purely to protect the plaintiff's interests. It is only after the parties had signed the agreement that the identity of the vehicle would be disclosed. It was envisaged that what was referred to as 'the principal agreement' would eventually have to be signed and executed between the promoters and the principal owners. There is conspicuously no mention of the plaintiff as a party in the future principal agreement.

[21] Learned counsel for the second defendant has argued that even if the agreement is valid, the plaintiff has no locus or legal right to commence this action against the defendants. He referred the court to s 183 of the Contracts Act 1950 which reads as follows:

> 183 In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Such a contract shall be presumed to exist in the following cases:

(a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(b) where the agent does not disclose the name of his principal; and

(c) where the principal, though disclosed, cannot be sued.

[22] In the case of *Exquisite Merge (M) Sdn Bhd v Life Publishers Bhd* [1997] 2 MLJ 749; [1997] 3 CLJ 493, the Court of Appeal, in considering whether the appellant was personally liable, dealt at length with the provisions of s 183 of the Contracts Act 1950. In that case, the respondent's claim arose from a contract where the appellant had agreed to supply newsprint printing paper to the respondent. The supply was defective and not up to the specifications agreed upon. The respondent claimed that they had suffered damages. However, the appellants' response was that at all material times, they were acting for a disclosed principal and therefore they were not personally liable. At the High Court, the learned judge relied on the decision of the Supreme Court in the case of *Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd* [1993] 2 MLJ 416 where the agent was held personally liable as a matter of statutory presumption. The Supreme Court held that the presumption arose when it was proved that the agent was acting on behalf of his principal in respect of a contract for the sale and purchase of goods from a principal who is abroad.

[23] Learned counsel for the second defendant has placed Veliance on the judgment of Mahadev Shanker JCA where at p 755 (MLJ); p 498 para h (CLJ) he held as follows:

> Where a contract is being concluded by two parties, both within Malaysia, the rule is that if one of them is known by the other to be contracting as an agent then he cannot sue or be sued on the contract. If in such circumstances the agent is to be invested with capacity to sue, and/or with personal liability for default there has to be a contract to that effect which has to be proved.

[24] A careful reading of the decision in *Exquisite Merge* will reveal that it is not at all supportive of the second defendant's position in the instant case. Following from the above extract, His Lordship went on to say that:

> In each of the three situations in s 183 the law will presume that such a contract exists. It is to be noted that only s 183(a) refers to a position where the Malaysian agent is buying or selling goods for a party resident abroad. Section 183(b) and (c) could equally apply where all the parties are in Malaysia at the time the contract is concluded.

Reading the provisions of s 183 in totality, it can be seen that whilst an agent cannot personally enforce a contract entered into by him on behalf of his principal without a contract to that effect, however such a contract is presumed to exist in the three situations spelt out in s 183(a), (b) and (c). In our instant case, the plaintiff did not disclose the name of his principal in the agreement. Although the second defendant has submitted that the plaintiff's stand is that the principal owners were introduced on the day of the signing of the agreement itself and therefore the plaintiff was estopped from saying that the principal owners were not disclosed, I am unable to agree with this argument in light of the denial of the second defendant as to the introduction of the said principal owners. The second defendant should not be allowed to deny the introduction on the one hand and yet, on the other, argue that the plaintiff was estopped from denying that the principal owners were introduced.

[25] As such, on this issue, I find that the statutory presumption under s 183(b) is invoked and that the plaintiff is entitled to bring this action notwithstanding that he is an agent. I find that the plaintiff albeit described in the agreement as 'an agent of the principal owners' has the locus standi to commence this action.

WHETHER AGREEMENT VOID DUE TO IMPOSSIBILITY

[26] The second defendant has also argued that the agreement is void due to impossibility. It is also noted in passing that this same argument was also advanced by the first defendant.

[27] The second defendant prefaced this argument on the fact that the subject matter of the agreement was to achieve two goals, namely the stay of

the winding up of ST Holdings Bhd ('STB') and secondly the relisting of STB with the injection of the first defendant's assets. It is argued that since these goals are impossible to achieve, the agreement is thus void for impossibility. The second defendant relies on s 57(1) of the Contracts Act 1950 which states that an agreement to do an impossible act is void.

[28] It is not denied that STB was wound up on 19 October 1987 which is some 15 years before the signing of the agreement. It is also noted that the report of the official receiver dated 30 January 1991 states that the directors of the company could not be traced although all possible attempts were made to do so. In arguing that no stay of the winding up order would be possible, counsel referred the court to the case of *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709 where the Federal Court found that there was a delay when it allowed an appeal against an order of the High Court to stay the winding up of a company which had already been wound up for 5 1/2 years. There the Federal Court referred to an earlier case of *Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors* [1981] 2 MLJ 114 where the Federal Court had held that an application for stay made 1 1/2 years after the winding up order to have been made late. Reference was also made to the case of *Ting Yuk Kiong v Mawar Biru Sdn Bhd (Harry Lee Yew Tong, Applicant)* [1995] 2 MLJ 700 where Ariffin J (as he then was) held that in order to obtain a stay of the winding up proceedings, the applicant must convince the court that each member of the company had consented or would otherwise be bound not to object to it.

[29] The second defendant thus submits that as the directors of STB cannot be traced, it would be impossible to trace each and every one of its shareholders and consequently the requirement as set out in the case of *Ting Yuk Kiong* cannot be fulfilled, especially since STB has been wound up for more than 15 years.

[30] Although I would agree that in all the circumstances of the case, the odds would appear to be stacked up against a successful stay of the winding up order, however I would be constrained to agree with learned counsel for the plaintiff that a court has the discretion whether to grant a stay or otherwise and that discretion would be exercised based squarely on the merits and circumstances of the individual case. These circumstances are many and varied and the circumstances now may well be different from that prevailing in 1991. As such, any suggestion that a particular outcome in a court would be impossible would be premature and amount to pre-judging a case.

[31] In the circumstances, I find that there are no merits in the second defendant's argument that the agreement is void due to impossibility.

A FAILURE TO COMPLY WITH ITS OBLIGATIONS UNDER THE AGREEMENT

[32] The second defendant has also argued that the plaintiff has failed to comply with its obligations under the agreement. He argues that in relation to the payment of the RM2m earnest sum, two events were supposed to take place before the said payment, namely a scheduled dinner with the governing authorities who would indicate the approval of the proposed exercise and only after that, and if both parties agree to go ahead, would the payment of the RM2m be due.

[33] The plaintiff contends that before the dinner could be arranged, they received the second defendant's letter which states that they were no longer interested in the proposal. They argue that they could not do what they were supposed to do because of the pre-meditated breach of the agreement by the second defendant.

[34] The plaintiff further points out that as per the general announcement on Parit Perak Holdings Bhd dated 22 October 2002, the special administrators first opened tender for the listing status of Parit Perak on 13 September 2002 and all interested parties were required to submit proposals by 23 September 2002. The plaintiff thus argues that when the first defendant's promoters participated in the tender in mid-September 2002, they already had the mala fide intention to breach the agreement. The plaintiff claims that it was only after the first defendant's promoters were successful in the Parit Perak tender that they wrote to the plaintiff to give 'feeble excuses to cover up their breach' of the agreement.

[35] I have carefully perused the relevant documents in relation to this issue. I am unable to find anything in the announcement of the special administrators which shows that the second defendant was aware of the outcome of the tender before 2 October 2002. As the date of the announcement was 22 October 2002, at best it will show that although the second defendant had submitted its proposal for Parit Perak before 2 October 2002, however he had written to the plaintiff to express his disinterest in pursuing its proposal any further *before* the date of the announcement of the Parit Perak restructuring. As such I am unable to arrive at a conclusion that the second defendant had terminated the agreement with the plaintiff only after he was successful with the Parit Perak tender.

[36] The court has studied both of the second defendant's letter dated 2 October 2002 and 3 October 2002. In both letters, the second defendant had alluded to the fact that his various queries and concerns re the plaintiff's concept paper had not been resolved. One of the concerns revolved around

the expectation of the authorities that the net tangible assets ('NTA') of STB after restructuring had to be no less than par value. The plaintiff was supposed to get clarification and confirmation from the relevant authorities on an urgent basis that the issue about the NTA would not be a problem. However, the plaintiff had not responded despite various reminders. I find that the final sentence in the letter of 2 October 2002 to the effect that 'we do not see a clear way forward and as such we are no longer interested in the above proposal' as well as the letter of 3 October 2002 which again states that 'there is no clear way forward and thus we are no longer interested in the above proposal' would point to the fact that the second defendant was in fact terminating the agreement.

[37] As such, I find that the second defendant had in fact terminated the agreement for the reasons as stated in his letters.

WHETHER LOSS OR DAMAGE PROVED

[38] The plaintiff initially claimed for specific performance, which claim they are no longer pursuing in light of the events that had occurred with the restructuring of Parit Perak. Alternatively, the plaintiff claims for:

(a) a sum of RM2m and interests thereon at 8%pa from the date of the agreement;

(b) a sum of RM28m and interests thereon at the rate of 8%pa from the date of the writ of summons until full settlement;

(c) additional compensation of RM10m; and

(d) costs.

[39] The plaintiff submits that its claim for the RM30m is based on the introducer/facilitator fee which it lost out on which would have been payable on successful completion of the exercise. As the plaintiff 'and its partners' had been frustrated from performing and completing its obligations due to the breach of the agreement by the defendants, the outcome of the exercise was rendered unknown. Although the RM30m was only payable upon the happening of the event, that event cannot now happen because of the defendants' breach.

[40] As for the RM10m, the plaintiff submits that since it is a beneficiary for the RM30m under the agreement which was signed by the defendants, this would show that the plaintiff had the expertise and credentials to do the job and to command the fee. In its statement of claim, it pleads that the RM10m is additional compensation for loss of reputation.

A **[41]** In relation to this issue, the second defendant has submitted that in order to succeed in its claim, the plaintiff has to prove the actual damage that it had suffered. Learned counsel submitted that throughout the trial, the plaintiff had not adduced any evidence at all as to the actual loss or damage suffered by them. Reference was made to the case of *Selva Kumar a/l*
B *Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 where the Federal Court, in considering s 75 of the Contracts Act 1950, held that in every case the court must consider what is the reasonable compensation. The Federal Court held that the words 'whether or not actual damage or loss is proved to have been caused thereby' must be given a restricted construction. Thus, a
C plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the settled principles in the case of *Hadley v Baxendale* (1854) 9 Exch 341. Any failure to prove such damages will result in the refusal of the court to award such damages.

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[42] From the onset, I would state here that the court regards the forfeiture provision in cl 6 of the agreement whereby the stakeholder would forfeit a sum of RM1m to the plaintiff in the event that the promoters prematurely terminate, withdraw and/or abort the proposed corporate exercise
E mid-stream as a penalty which is void in equity for being unconscionable. Similarly, cl 8 which provides for the payment of 10% of the total fcilitators'/passport fee (10% of RM30m = RM10m) is a penalty and also void. The plaintiff, in order to be entitled to such damages or compensation, would have to prove actual damage or loss suffered and the reasonable
F compensation in this case.

[43] Apart from saying that the RM30m would have been payable upon the successful completion of the exercise, the plaintiff has not done anything else to prove that it suffered damages amounting to RM30m. In this regard,
G the court has considered the nature of the work that was carried out by the plaintiff before the termination of the agreement by the second defendant.

[44] The agreement was signed on 30 August 2002. It was terminated by the second defendant vide its letter dated 2 October 2002. What were the
H plaintiff's obligations under the agreement and what did the plaintiff do or achieve between 30 August 2002 and 2 October 2002, a period of 32 days?

[45] During cross-examination, Koh Soo Hiong (SP2), was asked what
I were the works that the plaintiff carried out pursuant to the agreement. In answer 16 of his witness statement, he enlightened the court as to the 'intensive works' that were carried out by the plaintiff as follows:

(a) Introduced and arranged meetings between the authorised representatives of STB (Mr Francis Tan and Ms. Chow Lye Khoon) with the promoters, the managing and executive directors and advisor of the first plaintiff;

(b) Provided all documents to the first plaintiff on STB (such as ROC search reports, directors' listings, annual returns, last audited accounts, M & A, proof of debts);

(c) Obtained from Mr See Keng Leong the first plaintiff's past financials for the years ended 31 December 1996–2005 (audited accounts, last management accounts, company's profit) for evaluation purposes and to determine proper fair valuation of the proposed injection value worth of the first plaintiff;

(d) Worked with the first plaintiff's merchant bankers to formulate and present to the first plaintiff and its promoters 'a full indicative concept proposal setting out the detailed and suggested stages to be undertaken';

(e) Act as a facilitator and assist in the liaison and clearance of various queries from Mr See Keng Leong, Mr CS Lim and Allied Merchant bank, the first defendant's then finance director, advisor and merchant bank respectively;

(f) Co-ordinated with lawyers for the drafting of the mandate agreement and arranging for the meeting for the signing of the agreement.

Despite the impressive and lofty language used to describe the functions of the plaintiff, what it eventually boils down to is that they were supposed to provide the introduction, provide preliminary details and generally assist in the proposed corporate exercise.

[46] Upon a careful scrutiny of SP2's evidence, it becomes clear that initially SP2 had kept the identity of the vehicle for the proposed corporate exercise close to his chest. During cross-examination, he admitted that at the date of the signing of the agreement, the second defendant was not aware that the vehicle for the exercise was STB. He agreed that STB was revealed as the vehicle for the first time at the signing of the agreement at the Istana Hotel. He further agreed that when STB was revealed as a vehicle, he did not inform the second defendant that STB had been wound up by the High Court.

[47] According to the second defendant, had he known that STB had been wound up since 19 October 1987, he would not have bothered to sign the agreement. He told the court that he 'would have queried like any logical person the actual feasibility of reviving and thereafter re-listing a company which has been wound up for some 15 years'. On the other hand, SP2 would have the court believe that there were no concerns that the authorities would

not agree to a re-listing and that all parties were confident that a company which had been delisted could be easily re-listed. Looking at all the evidence adduced by the parties, I find that the non-payment of the RM2m earnest sum to be corroborative of the second defendant's concerns.

[48] The earnest sum was supposed to be paid upon the execution of the agreement. It was clearly not paid. SP2's own e-mail sent on 5 September 2002 talks about seeking 'an unofficial OK from the authorities'. If everything was okay, a private dinner would then be arranged 'for us to have a first hand feel coming from one of the governing authorities'. It was only after the 'scheduled dinner, and both parties agree to move ahead' that the payment of the RM2m would be due. As stated earlier, I would view the above e-mail as reflective of the second defendant's concern that the proposed vehicle was not a viable option. They wanted some unofficial word from the authorities before they would pay the money.

The terms of the agreement can be seen to have been varied practically from its inception. I further find that the willingness of the plaintiff as well as the principal owners to agree to a deferment of payment of the ernest sum would point to the fact that the second defendant's concern was a valid one.

[49] It is undisputed that even as at the date of the purported cancellation of the agreement by the second defendant, the RM2m had not been paid. Needless to say, the other RM28m was also not paid. It is imperative at this stage to re-look at the agreement to see what the RM30m was to be paid for.

[50] Clause 5 of the agreement is clear and unambiguous. The RM30m was for the provision of services by the plaintiff 'and/of the principal owners allowing and facilitating the proposed corporate exercise (and) eventually passing over of control interest in STB to the promoters'. The court notes the evidence of SP1 to the effect that the RM30m was the plaintiff's service fee. The court further notes his claim that RM30m just for providing those services was not excessive. He further disagreed that the RM30m was actually for the successful relisting of STB with the first defendant's shares injected into it and at least RM30m worth of shares being transferred to the second defendant and the other promoters. I find SPl's evidence in this regard to be totally unbelievable and, to put it kindly, to be reflective of his naivety and lack of knowledge as regards the entire transaction.

[51] It is crystal clear that the RM30m was *not* the service fee to help list the first defendant through STB as claimed by SP1. I find from the clear words in cl 5 that the RM30m is clearly stated as 'only due and payable on

a success basis as evidenced by the receipt of the approval letter from the securities commission ('SC') approving the said proposed corporate exercise'. It is obvious that the plaintiff's proposal did not proceed very far or for very long.

[52] The plaintiff also bases its claim of the RM10m on its loss of reputation as an investment company and commission agent. The court notes that SP2 is the *only* employee of the plaintiff and that its two directors both hold down full time jobs. The statutory documents extracted from the Companies Commission of Malaysia reveals that it was incorporated on 18 December 1998. However there appears to be no information as to its financial position. In light of this, and in the absence of any evidence whatsoever on this claim of loss of reputation, I find that the plaintiff has not succeeded in proving that it has in fact suffered any loss of reputation or at all.

[53] Based on the totality of evidence adduced on this point, I find that although the plaintiff had done some work towards the proposed corporate exercise, it could not be said that it had done very much work because the second defendant was still not satisfied enough to pay the earnest sum up to the time of the termination of the agreement. There was thus no issue about any stakeholder holding RM2m or any forfeiture of RM1m to the plaintiff. To be entitled to the various sums claimed as damages and compensation, the plaintiff would have to show the court by credible evidence the actual damage or loss suffered and this they have failed to do.

[54] As far as the claim of RM30m is concerned, I find the amount claimed to be unreasonable and totally unsupportable. The RM30m was only to be payable upon the Securities Commission approving the corporate exercise. There is no evidence that the Securities Commission had approved the corporate exercise, or were about to approve the corporate exercise. There was no evidence adduced that sufficient work had been done during the 32 days tenure of the agreement to even show that the approval was a possibility. I find that in all the circumstances of the case, the plaintiff's claim for RM30m was totally off the radar and not proved.

CONCLUSION

[55] Based on the foregoing, I find that the plaintiff has not made out its

A claim against both the first and second defendants on the balance of probabilities and I hereby dismiss the plaintiff's claim against both defendants with costs.

Plaintiff's claim dismissed with costs.

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Reported by Ashgar Ali Ali Mohamed

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